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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR AGUILERA,

Defendant and Appellant.

B282381

(Los Angeles County
Super. Ct. No. LA070638)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed and remanded with directions.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Oscar Aguilera was convicted of first degree murder and of being a felon in possession of a firearm. A gang enhancement and firearm enhancements were found true. On appeal, we reject defendant's argument that he never admitted being a felon. Defendant's trial counsel and the prosecutor stipulated to that fact in front of jurors in accordance with their prearranged agreement.

Defendant's challenge to the sufficiency of the evidence of the gang enhancement also lacks merit. The evidence was sufficient to show that murder and carjacking were among the primary activities of defendant's gang.

We affirm the judgment. Upon remand, the trial court shall allow defendant to present evidence relevant to a youth offender parole hearing and shall exercise its newly-received discretion whether to strike the firearm enhancements.

BACKGROUND

On January 15, 2012, defendant shot Samuel Guerra in the head multiple times outside a nightclub. He also shot Guerra in the elbow and neck. The nightclub was located in territory claimed by the Vineland Boyz gang. Guerra died of multiple gunshot wounds.

Defendant was a member of the Vineland Boyz street gang, and Guerra was a member of the La Mara Salvatrucha (MS) street gang. Shortly before the shooting, defendant was with other Vineland Boyz gang members outside the nightclub, and one of them put his fingers in the shape of a V, signifying his gang membership. Just before the shooting, defendant and his

fellow gang member¹ asked Guerra where he was from, a method of inquiring about a person's gang membership. Guerra responded that he was from MS.

In a two-count information, the People charged defendant with first degree murder (count 1) and with being a felon in possession of a firearm (count 2). With respect to the murder, the People alleged a gun enhancement pursuant to Penal Code² section 12022.53, subdivisions (b), (c), (d), and (e)(1). The People further alleged a gang enhancement pursuant to section 186.22 with respect to both crimes. Jurors found defendant guilty of the substantive offenses, found that he personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (d) and (e)(1), and found the gang enhancement true. Defendant timely appealed.

Additional facts relevant to defendant's specific claims of error are summarized below.

DISCUSSION

1. Defendant's Stipulation That He Was A Felon Was Sufficient To Prove That Element Of Possession Of A Firearm By A Felon

Defendant argues that his conviction for being a felon in possession of a firearm must be reversed because he never admitted that he was a felon. We begin with additional background and then explain why defendant's argument lacks merit.

¹ Jurors acquitted defendant's fellow gang member, who was tried with defendant.

² Undesignated statutory citations are to the Penal Code.

a. Additional background

Prior to trial, defendant's counsel requested a court trial on the element that defendant suffered a prior felony conviction. The prosecutor did not agree and, citing *People v. Valentine* (1986) 42 Cal.3d 170, the court denied defendant's request. *Valentine* "allows one of two alternatives when a defendant's prior felony conviction is an element of a charged crime: (1) The prosecution can prove the conviction in open court, and that proof can include both the fact that the defendant has previously been convicted of a felony offense as well as the nature of the felony involved; or (2) the defendant can stipulate to having a felony conviction and thereby keep from the jury the nature of the particular felony." (*People v. Sapp* (2003) 31 Cal.4th 240, 261.)

In lieu of the procedure defendant proposed, the trial court suggested that defendant could stipulate "that the defendant had been convicted of a felony. The nature of the felony can be withheld from the jury. The fact of the conviction, however, would come in through stipulation." The parties agreed to that procedure.

At the close of the prosecution case, defendant stipulated that he had been convicted of a prior felony. In front of jurors, the prosecutor asked: "Would counsel for Mr. Aguilera stipulate that Mr. Aguilera has suffered a prior felony conviction that this will relate to count 2?" Counsel responded: "So stipulated."

The trial court instructed the jurors that to find defendant guilty of unlawfully possessing a firearm, the People must prove: "1. The defendant possessed a firearm; [¶] 2. The defendant knew that he possessed the firearm; [¶] AND [¶] 3. The defendant had previously been convicted of a felony." The trial court also instructed jurors on stipulated facts as follows:

“During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true.”

After trial, for an unexplained reason, defendant waived jury trial on the prior conviction of a felony and the court indicated that a court trial would follow. No party reminded the court that it previously had rejected this procedure and that instead, the parties had stipulated that defendant had been convicted of a felony.

b. Defendant’s stipulation was sufficient to prove he was a felon

Section 29800 subdivision (a)(1) criminalizes the possession of a firearm by a person previously convicted of a felony. The prior conviction was a substantive element of the current charge of being a felon in possession of a firearm.

The parties stipulated that defendant was a felon in front of the jury, and the properly-instructed jury convicted defendant of being a felon in possession of a firearm. Nothing more was required to prove that element of the offense. (*People v. Farwell* (2018) 5 Cal.5th 295, 300 [“stipulation conclusively established the stipulated facts as true”].) Further, the stipulation was consistent with the parties’ pretrial agreement.

After trial, the trial court erroneously concluded that further proceedings were required for defendant to admit the prior conviction. This conclusion was both inconsistent with the parties’ earlier agreement and inconsistent with California law which prohibits in a jury trial proof of the prior felony conviction made only to the judge when the conviction is an element of an offense. (*People v. Sapp, supra*, 31 Cal.4th at p. 262.)

Defendant's argument that the trial court's posttrial error requires the reversal of his conviction is not persuasive. His claim that before trial he simply waived a jury trial on the element of suffering a prior felony conviction mischaracterizes the proceedings. Prior to trial, defendant agreed to admit the prior felony conviction in order to limit evidence of that conviction. His counsel stated: "I am asking that we would stipulate to the prior conviction." This procedure benefitted defendant because the prosecutor did not admit evidence of the nature of defendant's prior conviction. On appeal, defendant argues an incompatible position.³

Defendant argues that under section 1158, he is entitled to an acquittal on the crime of being a felon in possession of a firearm because there was no "finding" that he suffered a prior conviction. Defendant's reliance on section 1158⁴ is misplaced

³ Although defendant faults respondent for assuming incompatible positions, respondent's position on appeal is consistent with the prosecutor's and defendant's pretrial agreement.

⁴ Section 1158 provides: "Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: 'We (or I) find the charge of previous conviction true' or 'We (or I) find the charge of previous conviction not true,' according as the jury or the judge find that the defendant has or has not suffered such conviction. If more than one previous conviction is charged a separate finding must be made as to each."

because he fails to show that the statute applies to proof of a substantive element of an offense, in contrast to a prior conviction alleged for purposes of a sentencing enhancement. (See, e.g., *People v. Williams* (2002) 99 Cal.App.4th 696, 700 [“The right to have a jury determine factual issues relating to a prior conviction alleged for purposes of sentencing enhancements is statutory, not constitutional, and derives from sections 1025 and 1158.”]; *People v. Pierson* (1969) 273 Cal.App.2d 130, 132 [“The general rule is that the procedures set out in . . . [section 1158] are requisites only when the prior offense is not an integral part of the current substantive offense charged”].) In any event, even if defendant could show section 1158 applies to a substantive element of an offense, defendant’s stipulation satisfied that statute’s proviso that a defendant’s admission of a prior conviction satisfies that statute. Specifically, defendant stipulated that he “has suffered a prior felony conviction that this will relate to count 2.”⁵

2. The Gang Enhancement Is Supported By Sufficient Evidence

The jury convicted defendant of a gang enhancement which required finding that defendant’s conduct was for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) A criminal street gang is defined as an organization having specific primary activities. (*Id.*, subd. (f).) Primary activities sufficient to support the enhancement include

⁵ In his reply brief, defendant intimates that he did not understand that his stipulation was an admission. He provides no citation to the record, nor does the record support his assertion.

murder, robbery, and carjacking. (*Id.*, subd. (e).) The trial court limited the instruction on primary activities to those offenses. Defendant argues that there was not sufficient evidence to support the finding that the primary activities of the Vineland Boyz included the commission of murder, robbery, and carjacking. Defendant does not challenge any other prerequisite for the gang enhancement.

a. Additional background

Police officer Henry Garay testified as a gang expert. Ten of Garay's 14 years on the police force were dedicated to a gang detail. Officer Garay testified about a shooting involving the death of a Vineland Boyz gang member and the death of a Burbank police officer. Garay had responded to the scene of the shooting. Officer Garay testified that asking a person "where are you from" often leads to the use of a gun. Garay testified that he was familiar with the gang's pattern of criminal conduct because he "investigated cases personally where Vineland Boy[z] gang members have committed graffiti, vandalism, carjackings, the use of a firearm, [and the] murder of a police officer." Garay also investigated an attempted murder. Officer Garay testified that the gang's "pattern of criminal activity" includes graffiti, vandalism, murder of a police officer, attempted murder, carjacking, and robbery.

Garay testified that José Gutierrez, a member of Vineland Boyz, committed a carjacking. Garay testified that murder was the "extreme"; the Vineland Boyz also commit assaults, batteries, and stabbings. In the last year, about one or two incidents resulted in a "murder" case. In the last year, Officer Garay personally investigated an attempted murder case.

Detective Joshua Byers testified that Juan Huezo was convicted of murder. Huezo was a Vineland Boyz gang member with the moniker “Bones.”

b. Sufficient evidence shows that murder and carjacking were among the Vineland Boyz’s primary activities

“ ‘Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.]’ [Citation.] The standard of review is the same where the prosecution relies primarily on circumstantial evidence. [Citation.] Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]’ [Citation.] The same standard of review applies to section 186.22 gang enhancements.” (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610.)

Primary activities of the gang may be based on both past and present criminal activities of the gang. (*In re Alexander L.*, *supra*, 149 Cal.App.4th at p. 611.) Something more than isolated criminal conduct is required. (*Ibid.*) “The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang’s primary activities.” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

Here, the evidence was sufficient to show that the Vineland Boyz consistently and repeatedly commit murders, robberies, and carjackings. (See *People v. Duran*, *supra*, 97 Cal.App.4th at pp. 1464–1465 [proof gang members repeatedly committed crimes enumerated in section 186.22, subdivision (e) sufficient to satisfy the primary activities requirement].) Officer Garay testified that carjackings and robberies were part of the gang’s pattern of activity, supporting the inference that they happened repeatedly. Further, Garay had personal knowledge of a shooting involving the death of a police officer and of a carjacking and attempted murder. In the last year alone, the Vineland Boyz were responsible for two murders that resulted in criminal cases. Additionally, the current case involved the murder of Guerra, which the jurors could consider. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323.) This undisputed evidence was sufficient to support the jury verdict. (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 108.)

We reject defendant’s argument that Officer Garay lacked foundation for his conclusion that the pattern of activities included carjacking and robberies. Garay testified based on his personal knowledge, distinguishing this case from *In re Alexander L.*, *supra*, 149 Cal.App.4th at p. 612, in which it was impossible to determine the source of the gang expert’s testimony. Although Garay was not personally involved in robbery investigations, his personal involvement in carjacking and a murder investigation was sufficient to show that these were among the primary activities of the Vineland Boyz and that this element of the gang enhancement was supported by sufficient evidence.

3. The Case Must Be Remanded For A Youth Offender Parole Hearing And To Allow The Trial Court To Exercise Its Newly-Received Discretion To Strike A Section 12022.53 Firearm Enhancement

The parties agree that because defendant was under the age of 25 when he committed the crime, the case should be remanded for a youth offender parole hearing. Effective October 1, 2017 (after defendant's sentencing), a defendant who commits a crime prior to his 25th birthday is entitled to a youth offender parole hearing. (§ 3051, subd. (a)(1).) That statute provides: "A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger, . . . at the time of his or her controlling offense." (*Ibid.*) The statute applies retroactively to defendant. (*People v. Franklin* (2016) 63 Cal.4th 261, 278–280 [applying former section 3051 retroactively].) "Thus, we order a limited remand for both parties 'to make an accurate record of [defendant's] characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to "give great weight to" youth-related factors . . . in determining whether the offender is "fit to rejoin society" despite having committed a serious crime'" (*People v. Perez* (2016) 3 Cal.App.5th 612, 619.)

Finally, we agree with the parties that remand is necessary to enable the trial court to exercise its discretion whether to strike or impose the section 12022.53 firearm enhancements. At the time the trial court sentenced defendant, the court did not have discretion to strike any or all of the enhancements; it now does under section 12022.53, subdivision (h). Remand

for resentencing is necessary. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426–427.) Upon remand, the trial court shall determine whether a new probation report would assist the court in exercising its discretion to strike the gun enhancement.

DISPOSITION

The judgment is affirmed. On remand, the trial court shall hold a youth offender parole hearing under section 3051, subdivision (a)(1), and shall determine whether to strike the section 12022.53 enhancement. If the trial court strikes the enhancement, the court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.